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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS NEW YORK SHIPPING ASSOCIATION, INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

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Introduction

This brief is submitted by respondents New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA"), pursuant to Rules 40(3) and 41(2) of the Rules of this Court, in support of the decision of the Court of Appeals in this case, and in response to the briefs filed by petitioner National Labor Relations Board ("Board" or "NLRB") and by the respondents and *amici curiae* endorsing its position.[1]

[1] References in this brief designated "Pet. App." are to the pages of the appendix to the Board's petition for certiorari; references designated "A." are to the pages of the separately bound appendix; and, references designated "PB" are to the pages of the Board's brief. Other briefs are designated by the abbreviated names or acronyms of the parties sponsoring their submission.

Question Presented

National labor policy embodied in the doctrine of work preservation sanctions collectively bargained provisions preserving the traditional work of unit employees from technological displacement. In the longshore industry, as well as in many other industries, technological innovation has dislocated unit work. It has enabled workers at other work sites to perform work functionally equivalent to the traditional work practices of the unit employees protected by the contractual work preservation clause.

The fundamental threshold question in every work preservation case relates to the definition of the work in controversy—**whose work is it?** If it is identical or functionally equivalent to traditional unit work practices, and thus fairly claimable by the protected unit employees, it may lawfully be preserved or recaptured; if it is entirely new and unrelated work, it may not be acquired.

The basic but exceptionally important question in this case is:

> Whether the Board may ignore the protected unit's traditional work practices, performed prior to the emergence of the technological innovation, by defining the work in controversy as that performed away from the protected unit's work situs because of the innovation, thus automatically precluding any opportunity for the unit employees to preserve their work?

Counterstatement of the Case

Introduction

The undisputed facts in this case have been thoroughly and accurately portrayed in the opinion of the Court of Appeals. However, the briefs filed by the Board and its supporters contain extraneous materials that are not part of the record in this case. Consequently, this counterstatement is necessary to state with accuracy the facts of

record, without resort to extraneous articles, journals, reports and other writings never relied on in the Board decisions below.

The Labor Controversy

This case arises from the turbulent history of a labor struggle that has raged in the shipping industry without interruption for the past 25 years. It is a classic chronicle of a labor union's primary efforts to exact from its members' employers contractual protection for the job security of its members, who were faced with a drastic loss of work opportunities because of technological job displacement. (Pet. App. 14a-18a). Indeed, the Board readily admits that "the controversy in this case focuses on the response of the longshoremen's union and the shipping industry to containerization." (PB 3).

In the shipping industry, the union, International Longshoremen's Association, AFL-CIO ("ILA"), has resisted the encroachments of advancing technology which has decimated the number of its members and diminished their work opportunities. The focus of contention has been the industry's increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by decreasing the need for the traditional piece-by-piece loading and unloading of ocean borne cargo by ILA represented longshoremen. (Pet. App. 4a).

Traditional Longshore Work

The "work in controversy" in this case is the handling of cargo on piers and waterfront terminals in connection with its ocean transport.[2] Historically, the work of long-

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[2] This is explicitly set forth in the collectively bargained Rules on Containers at issue in this case:

> The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor.

Pet. App. 67a-68a; A. 278.

shoremen has not been limited to loading and unloading ships. As this Court determined in *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977) and in *P. C. Pfeiffer Co.* v. *Ford,* 48 U.S.L.W. 4018 (Nov. 27, 1979) (No. 78-425), and as the Board concedes in this case (PB 4, 7-8, 8 n.4, 14 n.13; *see also* TMTA Brief 9-10), longshoremen working on the docks in the ports of New York, Baltimore and Hampton Roads (as well as in all other ports on the Atlantic and Gulf Coasts) physically handled the movement of all ocean borne cargo piece-by-piece from the hold of the steamship vessel to the tailgate of the pickup or delivery truck. (Pet. App. 139a-140a; A. 109-117, 134-135, 150, 209-211, 600-602). This pattern of work encompassed not only the physical stowage and discharge of the cargo into and out of the vessel's hold, but also all of the interrelated functions involved in facilitating and preparing it for ocean transport, including receipt of cargo from land transportation, sorting and piling cargo onto pallets for stowage, removing the discharged cargo from pallets and storing the loose cargo on the waterfront terminal for transfer to land transportation and ultimate delivery to the consignees. (Pet. App. 4a, 48a-52a, 120a-121a, 139a-140a). *See also, Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n,* 426 F.2d 884, 886, 889 (2d Cir. 1970) (hereinafter "*ICTC*").[3]

Containerization radically changed this traditional method of cargo handling. Now hundreds of crates, packages and cartons, weighing more than 30,000 pounds, can be loaded on or unloaded from an ocean vessel without a

[3] The manpower requirements on a waterfront terminal are substantial. A permanent work force of many hundreds of longshore employees is required to staff a single waterfront facility, including such longshore crafts as longshoremen, dock bosses, equipment foremen, gearmen, maintenance men, checkers, cargo repairmen ("coopers"), carpenters, etc. (A. 109). In comparison, only a handful of workers are hired, frequently on a casual, day-to-day shape-up basis, at inland trucking, warehouse or consolidation facilities. (A. 23, 34-35).

single package being handled by the longshoremen. The result was a devastating loss of longshore work opportunities and manhours of employment, and a dramatic increase in dockside work productivity. (Pet. App. 4a-5a, 121a; A. 150, 210-212, 214, 464, 603, 627-628).[4] In the Port of New York alone, annual employment has declined from a pre-containerization level of 43 million hours in 1958 to less than 20 million manhours in 1977, even though the annual volume of cargo handled in the port almost doubled. (A. 464, 603, 627-628).

The Container Revolution

After World War II, small 8′ x 8′ x 8′ wooden receptacles, which the military had utilized during the war, were acquired by commercial steamship carriers to ship pilferable, fragile or hazardous cargoes. (A. 150, 602). These reusable boxes, which were transported on the decks of conventional breakbulk vessels, were loaded and unloaded by longshoremen at the piers, with the exception of boxes containing United States mail and household effects (exceptions which have continued to this day). (A. 602). In the 1950's, steamship carriers initiated the practice of deploying some of these boxes to manufacturers and other volume shippers who filled them at their own facilities with large single cargo lots. The wooden boxes were gradually replaced during the 1950's by metal containers of increasing size to accommodate more cargo.

The Container Age had its advent in the late 1950's in the New York to Puerto Rico trade when a tanker was converted into a cellular vessel to carry containers exclusively. (A. 117). The Port of New York was the birthplace of this

[4] The Court of Appeals noted that "[a]ccording to one estimate, the traditional method of handling cargo translated into a productivity factor of 1.4 tons per man-hour; containerization has made it possible for this figure to rise to 30 tons per man-hour." (Pet. App. 5a; footnote omitted).

dynamic container revolution which, until the late 1960's, was principally confined to the New York to Puerto Rico trade. (Pet. App. 14a). Although a few metal containers were in use, starting in 1965 or 1966 (A. 9, 176, 212, 223), it was not until the early 1970's that containerization, as it is known today, first appeared in other Atlantic Coast ports, including the Ports of Hampton Roads and Baltimore. (Pet. App. 8a, 120a-121a). Thereafter, there was a dramatic increase in container traffic and by 1973, containerized cargo reached appreciable proportions in all major North Atlantic ports. (Pet. App. 8a, 121a; A. 92, 103).

Negotiating History

From the inception of containerization in the late 1950's to the present, ILA and the employers of its member-longshoremen have disagreed about the use of containers. (Pet. App. 5a-18a, 121a-122a; A. 122-123, 221, 604-621). Steamship carriers, stevedores and other shipping employers, through their collective bargaining representatives, CONASA, NYSA, Hampton Roads Shipping Association ("HRSA") and Steamship Trade Association of Baltimore ("STAB"),[5] have consistently taken the position that their containers should be permitted to move on and off the docks without any ILA imposed restrictions. Conversely, ILA has strenuously resisted the use of containers. (A. 118-123, 220-221, 604). It has argued, just

[5] NYSA, HRSA and STAB are membership associations which act, on behalf of their members, as multi-employer collective bargaining representatives in the negotiation and administration of labor contracts with ILA. CONASA has represented constituent shipping associations, including NYSA, HRSA and STAB, in ports from Massachusetts to Virginia. Since its formation in 1970, CONASA has bargained with the ILA over certain key issues, including containerization, on a master-contract basis. Prior to the formation of CONASA, North Atlantic ports generally adopted the master terms of the labor agreement negotiated in the Port of New York. (Pet. App. 6a, 138a-139a; A. 17, 89).

as this Court has already held in *Northeast Marine* and *Pfeiffer,* that the container itself is a part of the hold of a steamship vessel. Consequently, the ILA has contended that the container should be loaded and unloaded by ILA longshoremen piece-by-piece and package-by-package, as had been done traditionally. The inevitable result was a sharp and acerbic labor relations conflict which was finally resolved—after years of costly labor strife—at the collective bargaining table. (Pet. App. 5a-6a, 8a-18a, 62a-79a, 141a-148a; A. 235-286, 316-326).

The first contractual attempt to resolve the issue of containerization was the 1959 collective bargaining agreement between ILA and NYSA in the Port of New York. (Pet. App. 14a, 93a; A. 605-606). It permitted the shipping employers' use of containers and the transport of full shipper's loads[6] without handling of their contents by longshoremen on the piers, subject only to the payment of a royalty, the amount of which was fixed by an arbitrator's award. (Pet. App. 15a; A. 17-18, 606-607). This accord conformed to the traditional pre-containerization practice of allowing manufacturers and other volume shippers to preload cargo receptacles. However, the 1959 labor agreement provided that local LCL cargo,[7] originating in or destined to a point within the area of the Port of New York, which historically arrived at or was picked up at the piers piece-by-piece, was to be loaded into and unloaded from steamship carrier containers at the piers by ILA longshore labor in order to preserve this traditional dock work. (Pet. App. 15a; A. 606).

[6] A full shipper's load ("FSL") is a full container load of goods beneficially owned by a single shipper or consignee, which loads or unloads the container at its own place of business. (Pet. App. 9a, 120a, 140a; A. 9, 57, 176).

[7] Shipments with volumes smaller than the capacity of a container are known as LCL ("less-than-containerload") or LTL ("less-than-trailerload") cargo. (Pet. App. 9a, 120a, 140a; A. 9).

Hundreds of grievances, dozens of work stoppages and wildcat strikes by ILA during the succeeding 10 year period evidenced the inadequacy of the 1959 contractual solution. (Pet. App. 6a-7a, 16a, 21a; A. 607-615). During this time, ILA accused NYSA and its steamship carrier members of violating their labor contract by aiding in the diversion of local LCL cargo away from the piers. ILA objected to the carriers' release of their containers to off-pier consolidation facilities which were beginning to emerge in this period.

The Rules on Containers

After the introduction of the first fully containerized vessel into the major North Atlantic trade in 1967 and the published plans by many shipping employers to embark upon full container operations, ILA demanded the right to load ("stuff") and unload ("strip") *all* containers in the 1968 collective bargaining negotiations. (Pet. App. 16a; A. 610). This demand was rejected and a 57-day strike ensued on the North Atlantic Coast. (Pet. App. 6a, 16a-17a; A. 123, 610).[8] The Presidential Board of Inquiry, established pursuant to the national emergency provisions of the Taft-Hartley Act, 29 U.S.C. § 171, *et seq.* (1976), reported that the critical issue separating the parties was the consequences of containerization. (A. 610-611). Under unrelenting strike pressure, and with the assistance of federal mediators appointed by the President of the United States, the shipping employers reluctantly reached agreement with ILA. (Pet. App. 6a-7a, 17a; A. 610-611). The resulting collective bargaining agreement, which was adopted in all North Atlantic ports, including New York, Baltimore and Hampton Roads, contained the Rules on Containers ("Rules")—essentially the same contractual provisions as those being challenged in the present case.

[8] The strike continued for more than 100 days in other Atlantic and Gulf ports. (A. 610).

The Rules represented a compromise between labor and management on the containerization issue. (Pet. App. 5a-18a, 121a-122a; A. 118-123, 220-221, 604-621). The shipping industry would have preferred unrestricted containerization. Nevertheless, it recognized that ILA had the right to demand and negotiate contract provisions preserving the work of its members. Similarly, ILA realized that it could not unreasonably impede technological progress. The basic compromise underlying and embodied in the Rules enabled containerization to flourish, producing a monumental increase in longshore work productivity. (*See,* p. 5, n.4, *supra*). (Pet. App. 4a-5a, 121a; A. 150, 210-212, 214, 603, 627-628).

ILA permitted the overwhelming bulk, or more than 80% of the container traffic on the Atlantic and Gulf Coasts,[9] consisting of FSL containers, as well as all other containers which originate at or are destined to points 50 or more miles from a port, to pass over the piers intact without any stripping or stuffing by ILA represented dockworkers. (A. 121-122, 215, 612). In exchange, the shipping employers agreed that any loading or unloading of their containers with cargo from within the local 50 mile port area (other than FSL cargo by employees of the beneficial owner of the cargo) would continue to be performed by their own longshore employees at the piers, as it had traditionally. (Pet. App. 9a-10a; A. 121-122, 235-242, 270-276, 612). This local cargo could feasibly and economically be loaded or

[9] In the Port of New York alone, more than 1,000,000 containers are currently transported each year. However, containerization still left a substantial amount of work on the piers. From the inception of containerization to the present time, every container steamship line has maintained an LCL facility at its piers where substantial quantities of LCL cargo are loaded into and discharged out of ocean containers by ILA represented dockworkers. In 1975, in the Port of New York, approximately 2,000 longshore employees worked in excess of 3 million manhours handling over 1.5 million tons of LCL cargo. (A. 604). The purpose and intent of the Rules was to maintain and preserve this longshore work from displacement to local off-pier work sites.

unloaded for ocean transport at the piers. The shipping employers acceded to the Rules which were designed to preserve this small portion of their employees' traditional work practices.[10]

Shortly after the Rules were formalized in the 1968 labor contract, their validity was upheld—first, under the Labor Management Relations Act, 1947, as amended ("LMRA"), 29 U.S.C. § 141, *et seq.* (1976), by a Regional Director and General Counsel of the NLRB, and then under the antitrust laws by the United States Court of Appeals for the Second Circuit in *ICTC.* (Pet. App. 39a-40a; A. 621).

In 1971, after another long strike of 56 days' duration, the resulting labor contract with the ILA, now negotiated by CONASA, left the 1968 Rules intact. (Pet. App. 10a-11a; A. 243-250, 615). Despite the contractual formality of the Rules, ILA continued to assert that the shipping employers were permitting, if not encouraging, violations of the labor contract, thus depriving ILA members of their traditional work. (A. 615-618). Faced with the ILA strike threat to halt the movement of all containers if the Rules were not effectively enforced, the shipping employers capitulated in 1973 to an amendment to the collective labor contract, known as the Dublin Supplement, that was designed to eliminate the violations cited by ILA. (Pet. App. 17a-18a; A. 264-269, 617).

In the Port of New York, the ILA's principal complaint was directed against the shipment of consolidated con-

[10] To induce on-pier performance of this work, the Rules provided that any export container which was loaded at a local off-pier facility located within 50 miles of a port, was to be stripped and stuffed into a container at pierside by ILA longshoremen. The converse applied to an import container; its contents would be stripped at the pier, if it was to be unloaded at an off-pier facility within the local 50 mile port area. (Pet. App. 9a-10a, 62a-79a, 141a-148a; A. 235-286, 316-326). The traditional exemptions for mail, household effects and FSL cargo loaded or unloaded by the beneficial owner were retained. (A. 121-122, 602-603, 612).

tainers (loaded with the individual cargo lots of several shippers), even though their contents had not been handled by longshoremen at the docks. To preclude this type of violation of the Rules, the Dublin Supplement expressly prohibited the shipping employers from releasing their containers to off-pier consolidation facilities. (A. 264-269, 617). The shipping employers were to advise the consolidation companies to deliver their loose cargo lots to the pier where they would be physically loaded in the first instance into the shipping employers' containers by their own longshore employees. Any import consolidated container was to be stripped at pierside and its contents picked up by the consolidator in uncontainerized form.

In Hampton Roads and Baltimore, the controversy between the ILA and the shipping employers centered upon imported FSL containers which, although designed for delivery intact to their consignees, were stopped short of their ultimate destination and stripped at warehouses or trucking stations within 50 miles of the port ("shortstopped containers"). (Pet. App. 44a-45a, 122a). The Dublin Supplement expressly reflected the longstanding and unequivocal understanding of both the ILA and the shipping employers that shortstopped containers lost their FSL identity, and were the equivalent of consolidated containers to be stripped at the piers. (Pet. App. 12a, 123a). However, the ILA agreed in the Dublin Supplement to an exception from the pierside stripping requirements of the Rules for FSL containers destined for unloading at warehouses within the 50 mile port area, provided their contents were genuinely warehoused for the customary 30 day period. (Pet. App. 12a, 45a, 123a).

The basic principles embodied in the 1968 and 1971 Rules and the Dublin Supplement were retained in the 1974 Rules on Containers that were the subject of the Board proceedings in this case. (Pet. App. 13a, 18a, 122a, 148a; A. 251-263, 277-286).

The *Dolphin* Proceeding (New York)[11]

Respondent Dolphin Forwarding, Inc. ("Dolphin") and San Juan Freight Forwarders, Inc. ("SJF") are engaged in the forwarding of cargo for ocean transport between the continental United States and Puerto Rico. (Pet. App. 92a). SJF was organized in 1972; Dolphin commenced business operations in 1964. (Pet. App. 21a-22a; A. 545).[12] Neither has ever consolidated LCL cargo with its own employees. Each solicited LCL cargo from various shippers and arranged for its consolidation into ocean containers within the 50 mile area of the Port of New York. (A. 631-634). Dolphin contracted with several inland warehouses and trucking terminals for this purpose. SJF had an exclusive off-pier consolidation agent whose employees were represented by a non-longshore ILA warehouse local. (A. 528).[13] Each successfully evaded the Rules.[14]

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[11] *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978). (Pet. App. 90a-109a).

[12] Dolphin was established with the active participation and assistance of Seatrain Lines, Inc. ("Seatrain"), a major steamship carrier in the New York to Puerto Rico trade. Seatrain proposed Dolphin's formation and actively assisted Dolphin in the solicitation of customers. Dolphin rewarded Seatrain by transporting all of its shipments on Seatrain vessels. (A. 492-498, 633-634).

[13] The Board's assertion that non-ILA labor consolidated shipments for SJF's account (PB 12) is factually inaccurate. This factual error belies the Board's erroneous suggestion that the Rules only interdicted off-pier consolidation if it were performed by non-ILA labor. (PB 11, 13). Like SJF's consolidation agent, the consolidator in *ICTC* employed ILA represented warehouse labor at its off-pier facility. ILA nevertheless enforced the Rules against both consolidators since the Rules were intended to preserve the on-pier work functions of ILA longshore labor, not union members generally. 426 F.2d at 889. *See generally, NLRB* v. *National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

[14] On the shipping documents transmitted to the ocean carrier, SJF depicted the origin of the containers as Chicago, Illinois even

(footnote continued on following page)

In late 1974 and early 1975, the Rules were enforced against two shipping employers, Maritime Transportation Management, Inc. ("MTM") and its predecessor, Transamerican Trailer Transport, Inc. ("TTT").[15] They were fined for furnishing off-pier access to their containers to Dolphin and SJF and for permitting shipment without pier-side stuffing and stripping of containers consolidated off-pier by Dolphin. (Pet. App. 24a-25a). When the shipping employers, in accordance with the Rules, advised SJF and Dolphin that they must truck their LCL cargo to the piers where it would be loaded into PRMSA's ocean containers by its longshore workers for transport on PRMSA's vessels,[16] these consolidation companies filed unfair labor practice charges with the NLRB.

(footnote continued from preceding page)

though they had been loaded in the New York area. (A. 540-544, 589-594). When SJF's evasive practices were exposed shortly after the inception of its operations, its shipments were consistently stripped and stuffed at the piers. (A. 542-544). It was the fixed policy of Dolphin from the inception of its operations to "continue to show Hanover [Massachusetts as the origin] as we did in the ST [*i.e.*, Seatrain] days" (A. 586), despite the fact that the containers were consolidated at warehouse facilities within the Port of New York area. (A. 485-486, 500-507, 583-587). When Dolphin's deception was discovered, its operations manager candidly admitted that "we [Dolphin] had been found." (A. 486, 585).

[15] After September 1, 1974, Puerto Rico Maritime Shipping Authority ("PRMSA"), an agency of the government of Puerto Rico, acquired the vessels and facilities of all the carriers then operating in the New York to Puerto Rico trade, *viz*, Sea-Land, Seatrain and TTT. (A. 544). PRMSA's vessels and New York waterfront terminals were managed by MTM and Puerto Rico Marine Management, Inc. ("PRMMI").

[16] The shipping employers *never* refused to "supply them with containers or provide space aboard their vessels" and *never* "ceased doing business with Dolphin and San Juan", contrary to the Board's incorrect assertion. (PB 13; *see also*, Dolphin Brief 4). Dolphin decided that it would be cheaper to route its shipments to the Port of Jacksonville, Florida for ocean transport to Puerto Rico. (A. 499). SJF, however, continued operations with PRMSA in the Port of New York.

An application by the NLRB for a preliminary injunction under LMRA § 10(l) was denied. *Danielson* v. *International Longshoremen's Ass'n,* No. 75 Civ. 4027 (S.D.N.Y. Sept. 18, 1975). The charges were then litigated before an Administrative Law Judge who struck all defenses and rejected virtually all defense evidence because he considered the case before him to be dispositively controlled by the Board's earlier *Conex* decision. (A. 576-582).[17] An initial decision by the Administrative Law Judge was waived. (A. 573). Thereafter, the charges were transferred for decision to a panel of the Board (A. 574-575), which also expressly considered *Conex* to be controlling. (Pet. App. 94a-95a). It thus concluded that the Rules constituted a hot cargo agreement in violation of LMRA § 8(e), 29 U.S.C. § 158(e) (1976), and that their enforcement by ILA against the shipping employers was proscribed secondary activity in violation of LMRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976).

The *Associated Transport* Proceeding—(Baltimore and Hampton Roads)[18]

Associated Transport, Inc. ("Associated") and Respondent Houff Transfer, Inc. ("Houff") are engaged in interstate motor carriage. (Pet. App. 19a, 137a-138a).[19] A minor portion of their operations has consisted of the drayage of import FSL ocean cargo from waterfront terminals in the Ports of Baltimore and Hampton Roads. When any

[17] *International Longshoremen's Ass'n (Consolidated Express, Inc.),* 221 N.L.R.B. 956 (1975), *enf'd,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977).

[18] *International Longshoremen's Ass'n (Associated Transport, Inc.),* 231 N.L.R.B. 351 (1977). (Pet. App. 110a-184a; A. 465-468).

[19] Associated is a member of Tidewater Motor Truck Association ("TMTA"), a trade association of trucking companies operating in the Hampton Roads area. (Pet. App. 138a-139a). TMTA is a respondent in this case.

trucker procures cargo at an ocean terminal, it presents a bill of lading (A. 298-301) and a delivery order (A. 287, 303), signed by the consignee, authorizing the steamship carrier to release the cargo to the trucker. (A. 51-52). This cargo is delivered in loose lots unless the trucker has an interchange agreement (A. 289-297, 407-419) with the ocean carrier permitting the trucker's use of the carrier's container.

Neither the bill of lading, the delivery order nor the interchange agreement controls or relates to the unloading of the container. (A. 49-50, 188-189). These documents do not authorize the trucker's removal of the cargo from the container prior to its delivery to the ultimate consignee.[20] They indicate instead that the container is destined for delivery intact to the consignee. (A. 223-224). Whenever a steamship carrier was informed that intact delivery would not occur, and that the trucker intended instead to unload the container at an inland facility within the 50 mile port area, the carrier had the container stripped at the pier by its longshore employees. (A. 21, 89-90). Indeed, it was admittedly (PB 17 n.16) the customary practice for all FSL containers destined to local port warehouses to be routinely stripped at the piers.[21]

These practices reflected the unequivocal and consistent interpretation by both labor and management in the long-

[20] TMTA argues that these documents do not "restrict the motor carrier's right to stuff or strip containers." (TMTA Brief 13). More importantly, however, neither do they permit such short-stopping. (A. 49). At best, it can be reasonably concluded that the interchange agreement clearly evidences the steamship carrier's unqualified control of its container and thus of the work of loading and unloading this equipment. The bill of lading and delivery order, on the other hand, have no relevant bearing since they merely facilitate the transfer of the cargo—whether containerized or loose—from the water to the land mode of transportation.

[21] This practice remained in effect until the adoption in 1973 of the Dublin Supplement's warehouse exemption. *See* p. 11, *supra.*

shore industry that the Rules prohibited shortstopping of FSL containers at local warehouses or trucking terminals. (Pet. App. 11a-12a, 124a-125a; A. 40-41, 102-103, 122, 165-166, 180-182, 222-223, 231-234).[22] In essence, a shortstopped container loses its FSL identity and becomes a consolidated container which must be stripped at the piers.[23]

Associated, Houff and other truckers were intimately aware, since as early as 1969, that, under the Rules, if an FSL container was to be stripped by other than the consignee's own employees within the 50-mile port area, this work had to be performed by longshoremen at the piers. (A. 11, 65, 71-72, 74-75, 207-209). Nevertheless, these truckers covertly carted FSL containers, destined for direct, intact delivery to their consignees, to trucking terminals located a short distance from the piers where they stripped the cargo and restuffed it into their over-the-road trucks. (A. 40, 56, 163).

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[22] From the inception of the container Rules in 1968, the joint labor-management committees in the Ports of Baltimore and Hampton Roads, entrusted with implementation of the Rules, regularly fined any steamship carrier which did not strip an FSL container that was shortstopped and unloaded at a local off-pier trucking or warehouse terminal. (A. 453-463).

[23] The Board contends that "no provisions in the Rules required ILA labor to strip FSL cargo at the pier until 1974". (PB 17; *see also,* Houff Brief 11). Conversely, nothing in the Rules ever prohibited pierside stripping of FSL cargo. Actually, neither the 1968, 1971 nor 1974 Rules ever expressly referred to full shipper's loads. They required pierside stripping of "LTL loads" and "consolidated full container loads". A shortstopped FSL container unloaded within the local port area by truckers or warehousemen became a "consolidated full container load" interdicted by the Rules. This was the unambiguous interpretation of the Rules jointly adopted by both labor and management in the longshore industry. In their collective judgment, shortstopping contravened the fundamental compromise struck by the Rules that any unloading of steamship carrier containers within the local port area, by other than the employees of an FSL beneficial owner-consignee, was traditional longshore work that should continue to be performed at the piers.

This shortstopping was essentially designed to increase the trucker's net profits by stripping the smaller ocean containers and consolidating their contents into larger over-the-road trucks. (PB 16; *see also,* TMTA Brief 14-15). However, the Board admits that truckers, both before and after containerization, picked up loose cargo at the piers. (PB at 14 n.13, 17 n.16). If a trucker finds it more profitable to haul cargo in its own larger trucks, no sound reason exists for it to change unilaterally its traditional practice of arranging for the longshoremen to strip the ocean container at the pier and to load its loose contents into the trucker's equipment. The trucker's adherence to this traditional practice would achieve its economic objective and at the same time preserve the longshoremen's traditional work of handling ocean cargo at the piers which includes its transfer to inland transportation. *Pfeiffer,* 48 U.S.L.W. at 4201.[24]

In 1974, two shipping employers, United States Lines and Lavino Shipping Company, were fined for violating the Rules on Containers in the Ports of Hampton Roads and Baltimore. (Pet. App. 23a-24a, 154a, 156a; A. 196-197, 398-399). Their containers had been shortstopped and stripped within the 50 mile port area at off-pier terminals operated by Associated and Houff. When Associated and Houff refused to reimburse the fines, the shipping employers rescinded the authority of these motor carriers

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[24] Similarly, putative safety or regulatory considerations (PB 6; *see also,* TMTA Brief 14) do not justify shortstopping. The interchange agreement specifically requires the lessor-ocean carrier to insure compliance with pertinent governmental regulations. (A. 292-293 ¶ Fifth (c)). If there are safety or regulatory deficiencies, the trucker should instruct the ocean carrier to remedy them during the pierside inspection of the container, prior to its release to the trucker. (A. 55, 191). The ocean carrier, at its own expense (A. 354-355), would then have its longshore employees correct any defects by rearranging the cargo or stripping and reloading it into another ocean container, or into the trucker's vehicle, thereby fulfilling its obligations to the trucker under the interchange agreement.

to haul the employers' containers. (Pet. App. 23a-24a, 155a-157a; A. 197-198, 329, 340, 404-405).[25]

Associated, Houff and TMTA then filed unfair labor practice charges with the NLRB. This initially set in motion two proceedings that ultimately resulted in the issuance of preliminary injunctions under LMRA § 10(l), 29 U.S.C. § 160(l) (1976), but only after diametrically divergent district court determinations on the same basic facts. *Compare Humphrey* v. *International Longshoremen's Ass'n,* 401 F.Supp. 1401 (E.D. Va. 1975), *rev'd,* 548 F.2d 494 (4th Cir. 1977) (injunction denied in Port of Hampton Roads, but reversed on appeal) *with Humphrey* v. *International Longshoremen's Ass'n,* No. Y-75-1395 (D.Md. Mar. 25, 1976) (injunction granted in Port of Baltimore).

The charges were then litigated before an Administrative Law Judge who concluded, in strict reliance upon the earlier *Conex* decision, that the Rules violated LMRA § 8(e), and that ILA's coercion of the shipping employers to enforce these contractual provisions violated the secondary boycott proscriptions of LMRA § 8(b)(4). A three member panel of the Board affirmed in a split opinion.

The Decisions of the Board

The Board's decisions in *Associated Transport* and *Dolphin* are virtually identical. In each case, the Board adjudicated the same fundamental question: whether the Rules are lawful work preservation provisions designed to

[25] Under the Rules, only the steamship employers were responsible for payment of the fines. The Rules neither required nor suggested reimbursement or the imposition of any other sanctions upon the trucker. The ILA did not demand, advise, assist nor in any way become involved with the steamship carrier's attempt to obtain reimbursement from the trucker (A. 219-220) or to cancel the carrier's interchange agreement with the trucker. (A. 36).

preserve for longshoremen their traditional work functions which were threatened by technological displacement.

In each case, the Board's invalidation of the Rules, as an unlawful work acquisition agreement, did not result from the exercise of its fact-finding powers. The facts in each case were undisputed. Instead, the Board's conclusion rested upon a fundamental error of law stemming from its adjudication of the elementary threshold issue present in every work preservation case, namely the definition of the work in controversy.

The Board, as it had in *Conex,* defined the work in controversy by focusing exclusively on the off-pier stuffing and stripping of containers by consolidators' and motor carriers' employees who had acquired this work as a result of the innovation wrought by containerization. In the Board's view, since the longshoremen's work jurisdiction has always been confined to waterfront facilities, they necessarily could not have traditionally performed the work in controversy, and, hence, by definition, the Rules must amount to an unlawful work acquisition device.

The Decision of the Court of Appeals

The Court of Appeals panel by majority vote reversed and vacated the Board decisions. The Court concluded, as a matter of law, that the Board erroneously misinterpreted and misapplied the doctrine of work preservation formulated by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967) and *NLRB* v. *Enterprise Ass'n of Steam, etc. Pipefitters,* 429 U.S. 507 (1977).

The Court of Appeals principally disagreed with the Board's definition of the work in controversy. It found this definition to be legally defective since it had been constructed by completely ignoring the traditional work practices performed by longshoremen prior to the introduction

of the technological innovation of containerization.[26] In the Court's view, the Board's analysis thus failed to examine "all of the surrounding circumstances" prescribed in *National Woodwork* and *Pipefitters* and, if allowed to prevail, would virtually obliterate the doctrine of work preservation.

> This formulation of the work in controversy, however, could not reasonably have been based on 'all the surrounding circumstances' as required by *National Woodwork* and *Pipefitters*. When a technological innovation is introduced in the workplace, new work may be created and may initially be performed, as in these cases, by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. As a rule, this cannot be done by ignoring those traditional work patterns when defining the work in controversy. But that is precisely what the NLRB has done here. Rather than define a category of work based on work patterns both prior and subsequent to the innovation, the Board has defined the work in controversy specifically in terms of the innovation, thus by *definition* removing any opportunity for pre-innovation workers to preserve their work. Under such a formulation the Supreme Court's work preservation doctrine is sapped of all life.

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[26] The Board's error of law is especially pronounced in light of the fact that the Board completely overlooked the striking similarities between the traditional work practices of longshoremen and the work of stuffing and stripping containers. It refused to adopt the inescapable conclusion previously reached by this Court that stuffing and stripping containers is the functional equivalent of traditional longshore work practices. *Northeast Marine, supra, aff'g, Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976); *Pfeiffer, supra. Accord, Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 272, 275-277 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); see also, *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F. 2d 800, 815 (2d Cir. 1971).

Pet. App. 46a-47a; emphasis in original and footnotes omitted.

The Court of Appeals also exposed two other fatal legal flaws in the Board's decisions. Each involved a basic misapplication by the Board of a key work preservation principle established by this Court in *National Woodwork* and *Pipefitters*. The first related to the "touchstone" of analysis sculptured by the *National Woodwork* Court for every work preservation case, namely, whether the challenged agreement or its implementation is addressed to the labor relations of the contracting employers *vis-a-vis* their own employees. 386 U.S. at 645. Conspicuously absent in this case was any organizational or other secondary purpose on the ILA's part with respect to the labor relations of the motor carriers or consolidators. Nevertheless, as the Court of Appeals panel concluded, the Board erroneously discounted this critical element of valid primary work preservation activity. (Pet. App. 53a-54a).

The second defect highlighted by the Court of Appeals was the Board's disregard of another key work preservation principle, namely, the Board's own right of control test sanctioned by this Court in *Pipefitters*. The Board simply never mentioned this test. It failed to take into account the contracting shipping employers' power of control to assign the disputed container stuffing and stripping work to their own ILA represented longshore employees—another crucial element of a lawful, primary work preservation clause. (Pet. App. 55a-57a).

In essence then, the Board is abandoning the traditional administrative agency role of applying established legal precedent to the facts and is instead following a novel decision-making course, first embarked upon in *Conex*, in which it has unilaterally altered the elementary principles of this Court's work preservation doctrine. If left unchecked, the effect of the Board's errant departure from

established precedent will be the demise of the work preservation doctrine. The Court of Appeals for the District of Columbia Circuit has exposed the fundamental legal errors being committed by the Board. In so doing, it has irreconcilably disagreed with the Second Circuit's decision in *Conex*.

Respondents NYSA and CONASA respectfully submit that the District of Columbia Circuit's determination in this case is the only legally correct decision and that the previous adjudications by the Board and Second Circuit in *Conex* are in error.

Summary of Argument

I.

This case presents a pure question of law involving the legal standards prescribed in the doctrine of work preservation. This doctrine requires the Board, in adjudicating the legality of a work preservation agreement, to focus upon the historical work functions performed by the employees protected by the challenged collective bargaining provision prior to the emergence of the technological innovation that displaced that work. *National Woodwork,* 386 U.S. at 615-616, 646; *Pipefitters,* 429 U.S. at 522-523.

In invalidating the Rules on Containers in this case, the Board contravened this fundamental work preservation principle. It erroneously focused upon work performed away from the protected unit's work situs because of innovation. The work in controversy in this case is not, as the Board erroneously concluded, the stuffing and stripping of containers at off-pier trucking or consolidation depots. It is the work traditionally performed by longshoremen at the piers in handling and preparing cargo for ocean transport. Containerization did not produce new and distinct

work practices. Stuffing and stripping containers is essentially the functional equivalent of traditional longshore work practices. *Northeast Marine,* 432 U.S. at 270-271; *Pfeiffer,* 48 U.S.L.W. at 4021. This body of longshore pier functions is the work in controversy.

The Board's failure to adopt this definition constituted a misapplication of the work preservation doctrine. If the Board's definition should prevail, then the doctrine of work preservation fashioned by this Court in *National Woodwork* and *Pipefitters* has been overruled, and virtually every effective work preservation clause would be declared invalid.

The Board compounded its erroneous definition of the work in controversy by failing to assign any significance to the undisputed fact that the longshoremen in this case had no organizational or other secondary designs to influence the labor relations of off-pier trucking and consolidation companies. The Board argues that absence of these secondary objectives is not relevant since the effect of the Rules on Containers, not their purpose, is the controlling factor. The Board's analysis conflicts with the fundamental principle that the union's purpose is the "touchstone". *National Woodwork,* 386 U.S. at 644-645. The Rules on Containers are not unlawful merely because they have an impact upon third parties. *Id.* at 627.

The Board's defective definition of the work in controversy also taints its right of control analysis. Contrary to the Board's contention, the longshoremen do not claim any off-pier work. Trucking and consolidation employees may continue to stuff and strip their employers' trucks and other equipment off-pier. However, all of the containers involved in this case are the property of the longshoremen's steamship carrier employers who have full right, dominion and control over their disposition. These carrier con-

tainers are the embodiment of pierside cargo handling work traditionally performed by longshoremen—the work in controversy in this case. The Rules merely prohibit the longshoremen's employers from displacing their employees' traditional work by requiring the employers to retain their containers at the piers. As the Court of Appeals concluded, "[i]t is difficult to imagine a more forceful demonstration of control." Pet. App. 57a. The Circuit Court simply underscored the fact that nowhere in the Board decisions addressing the Rules is there any doubt that the right of control resided in the longshoremen's employers.

II.

Houff contends that the longshoremen waived or abandoned their right to unload shortstopped containers at the piers. No case—not even the Board decisions in this litigation—has ever adopted Houff's alleged rule of abandonment. The absence of any express shortstopping prohibition in the early version of the Rules on Containers, entered into when containerization was in its infancy, did not constitute an irrevocable waiver of the longshoremen's work rights, particularly when there was no conscious, express abandonment, nor any *quid pro quo* therefor, and when there was an equivocal, contemporaneous contractual interpretation, both verbally and in practice, that a shortstopped container lost its FSL identity and became a consolidated container to be stripped at the piers under the Rules.

III.

The putative economic impact theory advocated by the Board is directly contrary to the established principle that the lawfulness of a work preservation agreement

does not depend upon "economic and technological factors". *National Woodwork,* 386 U S. at 644; *cf., NLRB* v. *Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, 72 (1964). The thrust of the Board's theory is that the Rules on Containers, or any other work preservation agreement, is subject to invalidation whenever it does not satisfy the Board's chosen economic calculus. This theory irreconcilably conflicts with the fundamental tenet of national labor policy favoring resolution of the conflicting interests of technological innovation and job security through collective bargaining. *National Woodwork,* 386 U.S. at 640-644.

The Rules on Containers represent a collectively bargained accommodation. They are "a reasoned response to the difficult problem of technological innovation and . . . an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector." Pet. App. 60a. The Board proposes to upset the compromise embodied in the Rules simply because it does not suit the Board's economic philosophy. It achieves this improper result by arbitrarily defining the work in controversy in terms of the work practices it chooses to promote. The Board's approach, if left undisturbed, threatens to thwart the process of collective bargaining.

ARGUMENT

I

The Rules on Containers are lawful work preservation provisions.

Standard of Review

This case presents a pure question of law relating to the standards prescribed in the doctrine of work preservation for defining the "work in controversy". The facts in this case are not in dispute. Indeed, the Board admitted in its brief to the Court of Appeals that "petitioners' real complaint is with the Board's analytic framework not its findings of fact." (Pet. App. 58a).

The Board's attempt at this juncture to convert this case into a factual controversy warranting invocation of the substantial evidence rule (PB 33-34; *see also,* TMTA Brief 39-40; NVOCCS Brief 9; ATA Brief 6; Construction Associations Brief 10-11) is a sweeping reversal of its previous forthright presentation to the Court of Appeals. There it claimed discretion to define the work in controversy as it chooses. Brief for Respondent NLRB at 16, 22, *International Longshoremen's Ass'n* v. *NLRB,* No. 78-1510 (D.C. Cir. 1979). Its choice does not depend upon any factual determination.[27] Consequently the Court of Ap-

[27] The various jurists who have disagreed with the Board's adjudication involving the Rules on Containers have done so while in total agreement on the facts before them. Their different conclusions have turned solely on the basic question of law concerning the correct definition of the work in controversy. *See, e.g.,* Pet. App. 57a-59a; *Conex,* 537 F.2d at 712-713 (*Feinberg, J., dissenting*); *Humphrey* v. *International Longshoremen's Ass'n,* 548 F.2d 494, 501 (4th Cir. 1977) (*Craven, J., dissenting*); *see also, Consolidated Express, Inc.* v. *New York Shipping Ass'n,* 452 F.Supp. 1024, 1040 n.14 (D.N.J. 1977), *aff'd in part and rev'd in part,* 602 F.2d 494 (3d Cir. 1979), *petitions for cert. filed,* 48 U.S.L.W. 3001 (U.S. June 22, 1979) (Nos. 78-1902, 78-1905 and 79-221).

peals properly exercised wide latitude, unrestricted by the constraints of the substantial evidence rule, in adjudicating the legal validity of the Board's chosen analytic framework. *NLRB* v. *Brown,* 380 U.S. 278, 290-292 (1965); *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956).

The Work In Controversy

The crucial question in this case, as well as in every work preservation case, is the frame of reference or starting point for defining the work in controversy. The Board may not arbitrarily focus at any starting point. Rather, the *National Woodwork* guideline or surrounding circumstance test that it must follow is "the remoteness of the threat of displacement *by* [*not of*] the banned product or service". 386 U.S. at 644, n.38. The Board must examine the historical work functions of the protected bargaining unit performed prior to the emergence of the technological innovation.[28] This is the work that is being displaced; this is the work that the challenged work preservation clause seeks to protect and preserve.

In *National Woodwork* this Court focused on the pre-innovation work of fitting blank doors historically performed on the construction site by job-site carpenters in the unit protected by the work preservation clause. These work functions were being threatened and virtually extinguished by the technological innovation of prefabricated doors manufactured at off-site plants.

The Board in this case, however, completely disregarded this elementary standard of work preservation analysis. It arbitrarily selected as its starting point the work performed after innovation by employees outside of the protected unit. (Pet. App. 95a, 116a). It improperly ignored

[28] *Pipefitters* reaffirmed the *National Woodwork* requirement of examining "the history . . . of the relevant jobsite work traditionally performed" by the employees protected by the challenged work preservation agreement. 429 U.S. at 522-523.

the traditional work performed by the protected unit prior to the advent of the innovative change that displaced the unit's work and allowed it to be performed elsewhere.

Contrary to the Board's current *post hoc* rationalization (PB 34; *see also,* TMTA Brief 51-52), its selection did not rest upon any fact-finding exercise. The Board decisions in this case are devoid of any factual explanation or justification for its chosen definition of the work in controversy. The Board did not undertake any factual assessment of the functional similarities or distinctions between traditional pierside work before containerization and off-pier stuffing and stripping of containers after the emergence of the technological innovation. There was no factual adjudication that this off-pier work possessed any special functional characteristic or feature that distinguished it from pre-containerization pierside cargo handling work practices.[29]

The sole foundation for the Board's definition is locational. The Board focused exclusively upon the post-containerization off-pier work and reasoned that it was not traditional longshore work simply because longshoremen have always done their work at the piers. (PB 37; *see also,* TMTA Brief 43, NVOCCS Brief 6-7; Construction Associations Brief 15). This is evident in the Board's *Associated Transport* decision. To the Board, the longshoremen's traditional pierside unloading of FSL containers destined for shortstopping at warehouses was irrelevant because, in the Board's view, the work in issue was not FSL containers shortstopped at warehouses, but only those shortstopped at trucking terminals. (Pet. App.

[29] Contrary to TMTA's spurious contention (TMTA Brief 48), which the Board has never adopted, this is not a case in which technology has so altered the nature of the work that the protected unit employees no longer have the skill or expertise to perform it. *See generally, Carrier Air Conditioning Co.* v. *NLRB,* 547 F.2d 1178 (2d Cir. 1976), *cert. denied,* 431 U.S. 974 (1977); *Associated General Contractors of Calif.* v. *NLRB,* 514 F.2d 433 (9th Cir. 1975).

116a). However, a shortstopped FSL container is a shortstopped container whether it is stripped at a warehouse or trucking depot. The Board's rejection of this significant fact highlights its major error of capriciously defining the work in controversy *a priori* by basing its definition strictly upon the location of its performance without regard to the fact that it constitutes a displacement of traditional longshore work. However, it is "the nature, not the location" of the work that is determinative. *Pfeiffer,* 48 U.S.L.W. at 4021.

The work in controversy then is not, as the Board erroneously assumed, the work of stuffing and stripping containers performed by truckers and consolidators at their off-pier premises. It is the traditional longshore work of handling and preparing cargo for ocean shipment at the piers, including, both before and after containerization, "the preparation of cargo for shipment by making up, for example, drafts and pallets and sorting the cargo according to its consignees and delivering it to the trucks or other carriers" and, also including after containerization, "packing and unpacking containers . . . at the docks". *ICTC,* 426 F.2d at 886, 889.

> In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. As Judge Friendly observed below, 'stripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on the shore and not in the ship's cargo holds.'

Northeast Marine, 432 U.S. 270-271 (citation omitted); *see also, Pfeiffer,* 48 U.S.L.W. at 4021.

Prior to containerization, all the work of loading, unloading, sorting or otherwise handling ocean-borne cargo was performed exclusively by longshoremen at the piers. Nevertheless, the Board closed its eyes to this historical fact by adopting the unfounded assumption that the work

involved in loading and unloading ocean containers is *sui generis*. It refuses to admit that this work is not something new, but rather is still part and parcel of the work of loading and unloading cargo for ocean shipment—work which longshoremen traditionally performed.[30]

This body of traditional longshore pier functions, which the Rules seek to protect from the threat of displacement by containerization, is the work in controversy. The Board facilely discredited the significance of these traditional longshore work practices by adopting the restrictive view that longshoremen load and unload ships. (Pet. App. 162a-163a). The Board then reasoned that any preparation of cargo for ocean shipment, including its placement or removal from containers, is merely ancillary to—not an integral part of—the actual longshore work of loading and unloading ships. (Pet. App. 163a). The Board then assumes that, if it is ancillary, container loading and unloading must be separate and distinct work having as its essential element the location of its performance. The Board's analysis is fundamentally defective since it directly conflicts with the incontrovertible reality, acknowledged in *Northeast Marine,* that container loading and unloading is integrally and functionally longshore work.

The Board now attempts to justify its erroneous definition of the work in controversy by glibly concocting two distinct markets for ocean borne cargo: (1) cargo routed

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> Containerization is relatively new. The loading and unloading of ships outruns history. The work to be preserved is the loading and unloading of ships. To focus entirely upon stripping and stuffing containers is to utterly ignore the traditional work of seamen and longshoremen, for there can be nothing traditional nor even long-established about containerization practice.
>
> • • •
>
> Twenty years ago the longshoremen had it all. Now they seek only to retain a part of it. This is not to me 'work acquisition'.

Humphrey, 548 F.2d at 500-501 (*Craven, J., dissenting*).

indirectly to the piers, *via* consolidators and truckers, and (2) cargo routed directly to the steamship carriers' terminals. (PB 34-35, 38-40). The absence of any mention of this economic fiction in either of the Board decisions in this case amply exemplifies its basic fallacy. The source of the cargo is irrelevant. The same shippers who, after containerization, brought their cargo to off-pier consolidators and truckers, had, prior to containerization, brought this same cargo in loose form either directly to the piers, or to off-pier consolidators or truckers, who in turn delivered it to the piers, where the cargo was loaded for ocean shipment piece-by-piece by the longshoremen.

The essential factor in this case is the loading and unloading function of ocean transport. The performance of this work, which is in integral part of the steamship carrier's operations, does not depend upon the shipper's chosen method of routing the cargo to the carrier's waterfront terminal. Whether the shipper initially routes its cargo directly to the piers or to intermediate off-pier terminals, it still must be loaded for ocean transport. The performance of this function is entirely dependent upon the steamship carrier. With the advent of containerization—concededly a concept of cargo movement developed by the carrier members of CONASA, NYSA, HRSA and STAB (Houff Brief 7)—the steamship carrier employers acquired the capability to erode the work functions of their longshore employees by releasing their ocean containers to off-pier facilities. The ILA recognized this potential threat to its members' traditional work jurisdiction and prohibited its members' employers from displacing this longshore work.

The Board's failure to define this longshore work as the work in controversy constituted a misapplication of the work preservation principles prescribed in *National Woodwork.* In that case, the carpenters, after the introduction of prefit doors, performed no work functions at their job sites on prefit doors which displaced the tradi-

tional carpentry work of cutting and fitting blank doors. It was this traditional work, performed at the construction sites before the advent of the prefabricated door, which constituted the work in controversy. The challenged work preservation clause prohibiting their employers' purchase of prefit doors, thereby enabling the carpenters to perform their traditional jobsite work of cutting and fitting blank doors, was upheld. To the longshoremen, the container is akin to the prefit door in *National Woodwork*. The off-pier stuffing and stripping of containers displaces the traditional longshore work of preparing cargo for ocean transport—the work in controversy. The Rules thus lawfully require the longshoremen's employers to discontinue the release of their containers for off-pier loading and unloading.

The Board's definition of the work in controversy in this case directly conflicts with *National Woodwork*.[31] In essence, the Board is redefining the work in controversy in *National Woodwork* in terms of the *work on prefit doors*. If the *National Woodwork* Court had adopted the Board's redefinition of the work in controversy "in terms of the innovation", *i.e.*, the work on prefit doors at the door manufacturers' plants, it would have been impelled to reach a completely different result. It would have in-

[31] The Board incorrectly distinguished *National Woodwork* on the ground that "the very work claimed had once been performed exclusively, by employees in the units represented by respondent organizations therein". (Pet. App. 166a). Actually, prefit doors were prevalent at construction sites before the enactment of the work preservation clause in issue in *National Woodwork*. In any event, the Board's putative exclusivity requirement, which is designed to justify its unwarranted definition of the work in controversy in this case, contravenes the well established principle of work recapture. *Sheet Metal Wkrs. Local 223* v. *NLRB*, 498 F.2d 687, 696, n.38 (D.C. Cir. 1974); *American Boiler Manufacturers' Ass'n* v. *NLRB*, 404 F.2d 547, 551, 554 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *Meat and Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964); *see generally, Note, Work Recapture Agreements and Secondary Boycotts: ILA* v. *NLRB (Consolidated Express, Inc.)*, 90 Harv. L. Rev. 815 (1977).

validated the clause, which prohibited the use of such prefit doors at construction sites, since, by definition, the boycotting carpenters did not perform any work on the prefit doors away from the construction site. *See, Conex*, 537 F.2d at 713 (*Feinberg, J., dissenting*).

If the Board's definition of the work in controversy should prevail,[32] then *National Woodwork* has been overruled, and virtually every effective work preservation clause would be subject to invalidation by the Board, since, by definition, it would be deemed an acquisition of work performed by employees outside of the bargaining unit after the introduction of new technology.

Primary Activity

A challenged work preservation clause and union actions to enforce it, which are "addressed to the labor relations of the contracting employer vis-a-vis his own employees", are lawful primary activities, which do not fall within the statutory proscriptions of LMRA §§ 8(b)(4) and 8(e). *National Woodwork*, 386 U.S. at 645; *Pipefitters*, 429 U.S. at 511. The union's purpose or intent is the "touchstone". *National Woodwork*, 386 U.S. at 644-646; see also, *Granddad Bread, Inc.* v. *Continental Baking Co.*, 1979-2 CCH Trade Cas. ¶ 63,017 (9th Cir. Nov. 23, 1979) (No. 78-3698). The relevant surrounding circumstance to be examined is "the

[32] The Board's definition in this case is a novel and sweeping deviation from the prevailing definition of the work in controversy observed in every work preservation case since *National Woodwork*. *See, e.g., Pipefitters; Houston Insulator Contractors Ass'n* v. *NLRB*, 386 U.S. 664 (1967); *Sheet Metal Wkrs. Local 223; Local 742, United Bro. of Carpenters & Joiners* v. *NLRB*, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); *ICTC; Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970); *American Boiler; NLRB* v. *Local 164, IBEW*, 388 F.2d 105 (3d Cir. 1968); *NLRB* v. *Local 28, Sheet Metal Wkrs. Int'l Ass'n*, 380 F.2d 827 (2d Cir. 1967); *cf., Electro-Coal Transfer Corp.* v. *General Longshore Wkrs. Local 1418*, 591 F.2d 284 (5th Cir. 1979); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 452 F.Supp. 1381 (D. Colo. 1978).

history of labor relations between the union and the employers who would be boycotted." *National Woodwork,* 386 U.S. at 644, n.38.

In this case, the ILA never once had a dispute, in the broadest sweep of the term, with any off-pier consolidator or trucker. Its actions have always been aimed at its primary employers, the steamship carriers.

The Board does not dispute the Court of Appeals' determination that the ILA had no organizational or other secondary designs to influence the labor relations of the trucking companies and off-pier consolidators.[33] It argues instead that the absence of these secondary objectives is not relevant, since the effect of the Rules on Containers was "to eliminate the performance of traditional job tasks elsewhere." (PB 43). However, purpose—not effect—is the controlling test.[34] A work preservation clause is not unlawful merely because it has a serious impact upon third parties. *National Woodwork,* 386 U.S. at 627; *Local 742, Carpenters; American Boiler; Local 164, IBEW; Local 28, Sheet Metal Wkrs.; cf. Anchortank, Inc.* v. *NLRB,* 601 F.2d 233 (5th Cir. 1979). Although "[t]he distinction

[33] Consequently, *International Longshoremen's Ass'n, Local 1575* v. *NLRB,* 560 F.2d 439 (1st Cir. 1977) and similar cases involving the use of a work preservation clause for secondary organizational purposes are not germane. *See, e.g., International Longshoremen's Ass'n (U.S. Naval Supply Center),* 195 N.L.R.B. 273 (1972); *cf., Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975).

[34] Nothing in the legislative history of LMRA §§ 8(b)(4) and 8(e) would support the Board's theory. *See, e.g.,* S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947); 93 CONG. REC. 3950, 3954, 7001 (1947) (remarks of Sen. Taft); 93 CONG. REC. 5046-47 (1947) (remarks of Sen. Murray); 93 CONG. REC. A 2377 (1947) (remarks of Sen. Ball), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 428, 1005-06, 1012-13, 1366-67, 1524, 1623 (1948).

between primary and secondary activity does not always turn on which group of employees the union seeks to benefit," *Pipefitters,* 429 U.S. at 528, n. 16, nevertheless it is a relevant and meaningful factor which the Board failed to consider in this case. The Board paid no attention to the threat to longshoremen and their jobs occasioned by containerization. It attached no importance to the history of labor relations in the longshore industry.

In all the turbulent history of containerization, the steamship carrier members of CONASA, NYSA, STAB and HRSA were never neutrals. They spawned the containerization technology that gravely threatened their longshore employees' job opportunities. They were the sole, direct and natural targets of the ILA's collective bargaining efforts to mitigate the effects upon its members of their employers' technological innovations. No off-pier trucking company or consolidator could satisfy the ILA's objective. Even if they were to recognize and sign agreements with the ILA (which ILA has never sought (Pet. App. 54a; A. 36, 188, 200)) and were to become signatories to the CONASA-ILA labor contract (which ILA has never sought), this still would not satisfy the ILA's objective that loading and unloading of local cargo into and out of the carriers' containers in connection with its ocean transport be performed by longshoremen at the *piers. ICTC,* 426 F.2d at 889; *see,* note 12 *supra.* Under these circumstances, the Rules on Containers could hardly have any secondary objective at off-pier facilities.

Right of Control

For the first time in the lengthy litigation involving the Rules on Containers, the right of control test is invoked by the Board. (PB 44-49; *see also,* TMTA Brief 54-56; NVOCCS Brief 11-13). In all of the Board decisions addressing the Rules, there is not the slightest trace of a doubt that the right of control resided in the longshoremen's employers. The court below simply underscored ex-

pressly what the Board had found implicitly.[35] The Board now seeks to rewrite its decisions in this case by retrospectively inserting a right of control analysis.

The Board's analysis, however, is fundamentally faulty. It is premised upon the astonishing contention that "[c]ontrol over the disposition of containers is not tantamount to control over the work in controversy." (PB 46). If, as the Board contends—albeit erroneously (*see*, pp. 27-33, *supra*)—"stuffing and stripping containers" constitutes the work in dispute, its performance necessarily depends upon the availability of containers. The same basic conclusion prevails, if, as NYSA and CONASA submit, the work in controversy is the handling and preparation of cargo for ocean shipment, since loading and unloading cargo into and out of containers is an integral feature of containerized ocean transport. In either case, the containers are the property of the steamship carriers who have full right, dominion and control over their disposition.

It was precisely for this reason that the longshoremen exacted at the collective bargaining table their employers' contractual commitment in the Rules to refrain from releasing their containers to off-pier facilities.[36]

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[35] It would appear that the First Circuit also accepts the right of control determination reached by the District of Columbia Circuit in this case. *International Longshoremen's Ass'n, Local 1575*, 560 F.2d at 447.

[36] If, in *National Woodwork*, the carpenters' employer had already purchased blank doors, which it then sent out to the manufacturers' factories to be prefit, the finding of work preservation would have been even more compelling, since this would have constituted in effect the subcontracting of the carpenters' fitting work. In this case, the Board decisions would require the steamship carriers to send out their ocean containers (blank doors) to be loaded or unloaded (fitted) at the off-pier facilities (manufacturers' factories). The Rules then are essentially a prohibition against subcontracting both in their purpose and effect.

Compliance with the Rules effectively preserves the longshoremen's traditional work. No displacement of that work can occur if the longshoremen's employers retain their containers at the piers. As the court below concluded, "[i]t is difficult to imagine a more forceful demonstration of control." (Pet. App. 57a).

The Board argues that the longshoremen's employers have "no right to award to longshoremen the stuffing and stripping work performed by these consolidators and truckers." (PB 45). In the Board's view, assignment of this work is made by the shippers who route their cargo to off-pier truckers and consolidators. (PB 47; *see also*, TMTA Brief 64-66; NVOCCS Brief 11; Construction Associations Brief 17; Houff Brief 23). The defect in the Board's reasoning stems from its imprecise definition of the work involved. Inland stuffing and stripping is not the work in controversy. See, pp. 27-33, *supra*. Contrary to the Board's contention (PB 40), the longshoremen do not claim this off-pier work. Inland employees may continue to stuff and strip their employers' trucks and other equipment at their off-pier work sites as they have historically. Thus, if an off-pier company, at a shipper's request, loaded the shipper's cargo into a container owned by the off-pier trucker or consolidator, the Rules would not interdict that shipment. However, all of the containers involved in this case are owned or leased by the steamship carriers. (Pet. App. 57a n.191).[37]

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[37] The longshoremen do not claim the right to stuff and strip containers that are not the property of their employers. In an early case in the Port of New York, NYSA objected to ILA's claim that cargo in containers owned by an off-pier consolidator had to be handled by longshoremen at the piers. *New York Shipping Ass'n* v. *International Longshoremen's Ass'n, Local 791*, 41 Lab. Arb. 809 (Turkus, Arb.), *enf'd*, 54 L.R.R.M. 2680 (Sup. Ct. N. Y. Co. 1963). The Arbitrator adopted the principle, which is now part of the industry's labor relations code, that containers owned by other than the longshoremen's employers "are to be moved without restriction or stripping on the pier". *Id.*, 41 Lab. Arb. at 811.

These carrier containers are the embodiment of pierside cargo handling work traditionally performed by the longshoremen. Their objection has always been limited to the displacement of this work by their employers' release off-pier of these carrier containers.

The Board does not dispute the carriers' right to refuse off-pier access to their containers.[38] It argues instead that this right is transmuted, in some unexplained fashion, by the shipper's contract of transportation with an off-pier company. (*See also,* Construction Associations Brief 17; NVOCCS Brief 11; TMTA Brief 56). However, this off-pier contract does not entitle the shipper to orchestrate the deployment of the property of the steamship carrier who is not a party thereto. Similarly, the Rules on Containers,

[38] The Board obliquely refers to *Consolidated Express, Inc.* v. *New York Shipping Ass'n,* 452 F.Supp. 1024 (D.N.J. 1977), *aff'd in part and rev'd in part,* 602 F.2d 494 (3d Cir. 1979), *petitions for cert. pending,* 48 U.S.L.W. 3001 (U.S. filed June 22, 1979) (Nos. 78-1902, 78-1905 and 79-221) and to *Sea-Land Service Inc., Proposed Rules on Containers,* F.M.C. Docket Nos. 73-17 and 74-40 (June 14, 1978), *appeal pending sub nom. Council of North Atlantic Shipping Associations* v. *FMC,* No. 78-1776 (D.C. Cir. filed Aug. 9, 1978). The Board suggests that these cases *might* affect the steamship carriers' right to withhold off-pier access to their containers. (PB 46 n.31). However, the Board itself conceded in its brief *amicus curiae* to this Court in Nos. 78-1902, 78-1905 and 79-221 that the predicate for these cases "is the Board's 1975 determination [in *Conex*] that the Rules and their implementation constituted an unfair labor practice", *id.* at 5—the very issue to be adjudicated in this case. Consequently, the determination of the labor law issue in this case cannot depend upon these other antitrust and shipping law adjudications. If the Rules are upheld as a lawful work preservation device in this case, these other decisions would lose their vitality since the doctrine of labor exemption would protect the Rules from challenge under federal antitrust and shipping laws. *FMC* v. *Pacific Maritime Ass'n,* 435 U.S. 40 (1978); *Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *Granddad Bread; ICTC; Suburban Beverages, Inc.* v. *Pabst Brewing Co.,* 462 F.Supp. 1301 (E.D. Wisc. 1978).

contrary to the Board's misconception, do not interfere with this off-pier contract. (PB 48-49). The Rules do not deprive any shipper of the services provided by local trucking and consolidation companies, including consolidation of small shipments, truck delivery and pick up, preparation of transportation documents, routing and tracing of shipments, settlement of claims, solicitation of freight, etc. (PB 7). Off-pier employees retain any cargo handling work relating to these off-pier transport services.

The Rules only affect the contractual relationship between shippers or off-pier companies and steamship carriers in connection with the carriers' ocean transport services. The only limitation imposed is the inability of any shipper or off-pier company to acquire traditional longshore work by gaining off-pier access to steamship carrier containers. The carriers have the obligation to accept cargo for transport. However, they also have the right to control the use of their property and the performance of their services "in a manner and to the extent compatible with their labor agreements and with both the carriers' and the union's rights and duties under federal labor law." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 177 (1962) (*concurring opinion*).

II

The longshoremen's work rights have never been abandoned.

Houff raises the unfounded contention that ILA waived or abandoned its members' right to unload shortstopped containers at the piers. (Houff Brief 27-34). Houff is a lone voice crying in the wilderness. Both the Court of Appeals in this case and the Second Circuit in *Conex* expressly rejected any abandonment theory. *Compare* Pet. App. 51a-53a n.178 *with Conex,* 537 F.2d at 712.

Moreover, Houff's argument finds no support in the Board's *Associated Transport* decision in this case—the very decision it purports to defend. Indeed, the Board candidly advised the Court of Appeals that "we agree, that the Board here did not rely upon ILA's having abandoned that work as an express alternate ground for finding an (8)e violation." Brief for Respondent NLRB at 30 n.19, *International Longshoremen's Ass'n* v. *NLRB*, Nos. 77-1735 & 77-1758 (D.C. Cir. 1979).

The fatal defect in Houff's argument is that it seeks to equate an FSL container with a shortstopped container. They are separate and distinct commodities that have never been treated the same. The FSL exemption was historically applicable only if the container was stripped at the consignee's facility by its employees. If it were shortstopped and handled at a local off-pier warehouse or trucking facility, it lost its FSL identity and became a consolidated container to be stripped at the piers. (Pet. App. 11a-12a, 124a-125a; A. 40-41, 102-103, 122, 165-166, 180-182, 222-223, 231-234).[39]

Houff mainly relies upon the absence of any express language in the 1968 or 1971 Rules relating to shortstopped containers. (Houff Brief 28). A labor agreement, however, is not "an ordinary contract." *Wiley* v. *Livingston*, 376 U.S. 543 (1964). Its silence does not amount to a contractual waiver since "it is an established and fundamental principle of labor law, that labor-management contracts are not to be read with narrow precision." *Local 742, Carpenters*, 444 F.2d at 902.

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[39] Prior to the 1973 Dublin Rules, every FSL container destined for shortstopping at a warehouse was unloaded at the piers by the longshoremen. *See*, p. 15, *supra*. This fact completely dispels Houff's claim of an unqualified FSL exemption prior to 1973. A shortstopped full shipper's load is a shortstopped full shipper's load whether it is stripped at a warehouse or at a trucking station. So long as it was to be shortstopped, the dockworkers never relinquished their right to unload its contents at the piers.

It is undisputed that there was no specific contractual waiver in this case.[40] Indeed, labor and management in the longshore industry unvaryingly interpreted the Rules from their inception to prohibit shortstopping of FSL containers. *See*, pp. 15-16, *supra*. Houff's claim of abandonment then runs afoul of the longstanding canon of contract construction that the uniform, practical and contemporaneous construction of a labor contract by the signatories thereto is dispositive in determining its intent and meaning. *NLRB* v. *Universal Services, Inc.*, 467 F.2d 579, 585 (9th Cir. 1972); *Pekar* v. *Local 181, United Brewery Wkrs.*, 311 F.2d 628, 636 (6th Cir. 1962), *cert. denied*, 373 U.S. 912 (1963); *Lewis* v. *Hixson*, 174 F.Supp. 241, 248 (W.D. Ark. 1959); *Amalgamated Local 877, United Automobile, Aircraft and Agricultural Implement Wkrs.* v. *United Aircraft Corp.*, 120 F.Supp. 186, 187 (D. Conn. 1952).

No case has ever adopted Houff's alleged rule of abandonment. The imprecise words of a labor contract, entered into when technology is in its infancy, should not be construed as an irrevocable, perpetual waiver of employees' rights to their traditional work, particularly when there is no conscious, express abandonment, nor any *quid pro quo* therefor,[41] and when there is a contrary contemporaneous

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[40] *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co.)*, 208 N.L.R.B. 994 (1974), *enf'd mem. sub nom. Pacific Maritime Ass'n* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), involving the longshore industry on the West Coast, is inapposite since there, in contrast to this case, the disputed work of preparing cargo for ocean shipment had been expressly bargained away by contract, and had for many years, even prior to containerization, been performed by teamsters and other non-longshoremen, both on-pier and off-pier, with the West Coast longshoremen's consent. *See, Ross, Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Lab. L. J. 397 (1970).

[41] Houff erroneously implies that the small royalty prescribed in the Rules constituted the consideration for the longshoremen's

(footnote continued on following page)

interpretation by those administering the labor contract, both verbally and in practice. Employees' work rights should not be so facilely discarded.[42]

III

The Rules on Containers represent a reasoned collectively bargained accommodation.

The prevalent theme in the briefs filed by the Board and its supporters centers upon the economic effects of the Rules on Containers. (PB 49-54; *see also,* Construction Associations Brief 18-20; ATA Brief 7-8; NVOCCS Brief 2-3). They implicitly suggest that the validity of a work preservation agreement under LMRA §§ 8(b)(4) and 8(e) depends upon the nature and extent of its economic impact.[43]. This Court, however, has decisively rejected the

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(footnote continued from preceding page)

contractual surrender of their work. (Houff Brief at 27-28). A royalty, however, connotes a retention—not an abandonment—of all right, title and interest in the work in dispute. More importantly, the royalty in this case was not intended to be applicable to shortstopped containers, but only FSL containers that were delivered intact to the consignees. If a container was to be shortstopped, then it should have been stripped at the piers under the Rules. Thus, the determinative factor was not the royalty, but whether or not the container went directly to the beneficial owner. (Pet. App. 52a n.178).

[42] Any such postulate of abandonment would improperly conflict with the employees' rights not only to preserve, but also to recapture lost work. (Pet. App. 52a n.178). *See,* cases cited note 30, *supra.*

[43] The Board prefaces its argument (PB 49-50) by admitting that the "economic personality of the industry" element of the *National Woodwork* surrounding circumstances test is designed solely to detect the union's purpose underlying the work preservation agreement in controversy. 386 U.S. at 644-645. The Board acknowledges that *Pipefitters* did not alter this basic purpose analysis. (PB 49-50). However, the Board then spuriously converts this purpose test into an economic effect or impact test (PB 52), premised apparently upon the observation in *Pipefitters* that the

(footnote continued on following page)

notion that a lawful work preservation agreement should be invalidated because of "economic and technological factors." *National Woodwork,* 386 U.S. at 644; *cf., NLRB* v. *Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, 72 (1964).[44]

The Board's putative economic impact test is not only legally impermissible, but also factually unsound. Contrary to the Board's groundless contention, the Rules on Containers do not "preclude steamship lines from doing business with consolidators and truckers and effectively deprive shippers of their services." (PB 49). The fundamental error in the Board's contention is highlighted in its own brief. It admits that prior to containerization "shippers utilized the services of" consolidators and truckers "to handle their transportation needs" and that these "middlemen" combined the shippers' cargoes and trucked them *"to the pier for handling by longshoremen."* (PB 34; *emphasis added*). The Rules on Containers simply maintain these traditional practices. There is no sound explanation advanced by the Board why consolidators and truckers cannot exist today under these same conditions.

The Rules on Containers do *not* deprive any shipper of the services provided by consolidators and truckers. *See,*

(footnote continued from preceding page)

Board in that case discussed "the economic context in which the dispute arose", including the potential effect of the product boycott. 429 U.S. at 524, n. 12. However, this Court did not sanction the Board's economic analysis. Indeed, if the economic effect of a boycott were a decisive factor, the dissent in *National Woodwork* would then prevail as the controlling law. 386 U.S. at 660-661. However, this Court in *Pipefitters* expressly reaffirmed the principles adopted by the majority in *National Woodwork.* 429 U.S. at 511.

[44] The Board's economic impact theory is refuted by its own acknowledgment that the challenged labor contract in *National Woodwork* was approved even though its invalidation "would have been more economical." (PB 38).

pp. 37-39, *supra*. Nor do they require the steamship carriers to deny access to containers, or to refuse to rent containers to these off-pier companies. (PB 51). Steamship carriers are not engaged in the container rental business. They transport cargo by sea. In connection with their transportation services, they utilize containers. The Rules in issue in this case only require the steamship carriers to make their containers available to the local consolidation companies, with LTL cargo, at the piers. If local port consolidators prefer to do their own loading and unloading, they need only acquire their own containers.[45] Similarly, any trucker who finds it more economical to haul FSL cargo in its own trucks can adhere to the historical practice of arranging to have the steamship carrier's container stripped at the pier. *See,* p. 17, *supra.*[46]

The thrust of the Board's economic impact theory is that the Rules, or any other work preservation agreement, must be invalidated whenever it does not meet the Board's own private economic calculus. The Board's argument irreconcilably conflicts with the fundamental tenet of national labor policy favoring resolution of the conflicting interests of technological innovation and job security through collective bargaining—not by governmental second guessing. Pet. App. 5a; *National Woodwork,* 386 U.S. at 640-644; *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964); *Conex,* 537 F.2d at 714 (*Feinberg, J., dissenting*).

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[45] As previously noted, the longshoremen limit their work preservation objective to containers that are owned or leased by their employers. No claim is made to stuff or strip any container that is the property of an off-pier company. *See,* note 37, *supra.*

[46] The Board makes no effort in its brief to reconcile a trucker's shortstopping with its perceived ideal of intact containerized transport from origin to destination. (PB 36, 53).

In this case, NYSA, CONASA, HRSA, STAB and their shipping employer members would have preferred unrestricted containerization. Conversely, ILA protested the implementation of this new technology which drastically displaced the jobs of its members. The Rules represent a collectively bargained compromise between these conflicting interests. The ILA bargained away the major part—more than 80%—of its historic right to handle *all* ocean going cargo engendering "a high rate of productivity growth" in the longshore industry consistent with the recommended goals prescribed in § 103(a) of the National Productivity and Quality of Working Life Act, 1975, 15 U.S.C. § 2403(a) (1976). However, ILA did not consent to a displacement of its members' traditional work of loading and unloading their employers' containers with local LTL and consolidated cargo from within the limited 50 mile geographic port area. This cargo could feasibly and economically be handled in preparation for ocean transport at the piers.

> These Rules represent a reasoned response to the difficult problem of technological innovation and are an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector. The Rules seek neither to stymie technological innovation nor to introduce manual labor in situations where the work otherwise would be handled by more efficient mechanized means; rather, the Rules intend to secure for ILA labor any stripping and stuffing of containers that is to be performed within 50 miles of port by other than the employees of the cargo's beneficial owner. Courts and the NLRB must take great care not to disturb the parties' reasoned attempts at self-governance unless those attempts contravene the law.

Pet. App. 60a-61a; footnotes omitted.

The Board proposes to upset the compromise embodied in the Rules simply because it does not suit the Board's economic philosophy. It achieves this improper result by arbitrarily defining the work in controversy in terms of the work practices it chooses to promote. The Board's approach, if left undisturbed, stands as a stark warning to any union faced with the demand to permit innovation, that it does so at its peril. No employer or union sitting down to bargain collectively on the subject of work preservation and job security could possibly know in advance whether the resulting labor agreement would prevail if the Board may have unbridled discretion to undo the bargain by the imperfect and purely subjective device of defining the work in controversy "in terms of the innovation." (Pet. App. 47a). Different and arbitrary results would prevail from industry to industry, from employer to employer, from work function to work function, from case to case. Forward looking collective compromises would be thwarted. Instead, there would be a reversion to economic warfare as labor unions would become "obdurate when asked to compromise some degree of job security for the sake of efficiency if that compromise might later be cast aside." (Pet. App. 33a).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the Rules on Containers upheld as lawful work preservation provisions.

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Respectfully submitted,

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